HONG LEONG EQUIPMENT SDN. BHD.

v.

MANFO DEVELOPMENT SDN. BHD & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C 913 OF 1984]
30 NOVEMBER 1985

CIVIL PROCEDURE: *Judgment in default of appearance - Application to set aside - Irregularity - Ex debito justitiae - Order 13 r. 8 of Rules of the High Court 1980 - Affidavit of merits - Discretion of Court - When application to set aside was filed - Full, frank and honest disclosure.*

CIVIL PROCEDURE: *Duty of the court - Setting aside regular judgments - Discretion - Principles which guide Court.*

This was an application by the 2nd defendant (guarantor) to set aside judgment in default of appearance that had been entered against him on 7 August 1984. The guarantor has now challenged the alleged service of the writ on him, denying in his affidavit that the writ was served on him. The 2nd defendant also contended that he had a defence on the merits of the case and also that the judgment against him should be set aside for irregularity.

Observations on power of Court to set aside judgments obtained regularly and irregularly.

(i) Since the defendant's contention was that the judgment should be set aside for irregularity, it was irrelevant for the defence to state that he had a defence on the merits. If a judgment was obtained irregularly, the defendant is entitled *ex debito justitiae* to have it set aside without any terms whatsoever being imposed on him.

(ii) If a judgment is regular

(a) The Court by O. 13 r. 8 of the Rules of the High Court 1980 has a discretion to set aside such a judgment and it is an almost inflexible rule that an affidavit of merits must be filed in support of the application (see *Farden v. Richter* [1889] 23 QBD 124). The prevalent practice of disclosing a "proposed statement of defence" without such an affidavit does not necessarily meet this requirement.

(b) On exercising its discretion the Court will certainly take into consideration the explanation or the lack of explanation as to why judgment in default was allowed to be entered (see *Evan v. Bartlam* [1937] AC 437 at 480).

(c) The Court will also expect the application to set aside to be filed promptly (see "reasonable time" in O. 2 of the Rules of the High Court 1980) and if not, the explanation if any for the delay would be relevant.

(d) The defendant who is seeking the indulgence of the Court should make full, frank, candid and honest disclosures of all the relevant facts. Failure to do so could result in the Court refusing to exercise its discretion in favour of the applicant.

Held:

[1] Since diametrically opposite positions were taken in the affidavits filed on the issue of service of the writ, the application was adjourned to open Court so that oral testimony on the issue could be given.

[2] Taking all the circumstances of the case into account and having seen the witnesses in open Court, it was held that the 2nd defendant had been personally served with the writ. On a balance of probability, the Court was satisfied that the writ was duly served as stated in the affidavit of service.

[3] The judgment was therefore a regular judgment. However, although there was an affidavit of merits, the 2nd defendant has fallen far short of the test of being frank, candid and honest. He came to Court with unclean hands and was not entitled to and did not obtain the assistance of the Court.

[Application to set aside the judgment was dismissed with costs.]

Cases referred to:
Farden v. Richter [1889] 23 QBD 124
Evan v. Bartlam [1937] AC 473

Legislation referred to:
Rules of the High Court 1980, O. 13, r. 8

For the plaintiffs/respondents - Chan Kai Meng; M/s. Chan Moosdeen & Partners
For the 2nd defendant/applicant - Raymond Kwok Sin Chuan; M/s. Kwok & Co.

JUDGMENT

VC George J:

This is an application by the second named defendant to set aside judgment in default of appearance that had been entered against him on 7 August 1984.

On the strength of an affidavit of service of the writ on the two defendants by Encik Chan Kai Meng, a certificate of non-appearance in respect of each of the defendants was issued by the relevant Senior Assistant Registrar on 7 August 1984 pursuant to which judgment in default of appearance was on 7 August 1984 entered against each of the defendants. The second named defendant Chan Fan Ann who was sued as a guarantor has now challenged the alleged service of the writ on him. In an affidavit in support of his application (the instant application) to have the judgment in default set aside he denies the contention in affidavit of service of the writ on him as alleged or at all. He says that he first came to know that proceedings had been commenced against him by the plaintiffs only when a bankruptcy notice was served on him on or about 15 July 1985. He has set out in his affidavit what he contends are the circumstances in which he came to execute the alleged document of guarantee on which the plaintiff's cause of action against him is founded and says that he has been advised by his solicitors that he has a defence on the merits. I think so too in that it discloses arguable or triable issues. However on the stand taken by the second defendant, that he has a defence on the merits is not all that relevant since his contention is that the judgment against him should be set aside for irregularity. It is trite that if a judgment was obtained irregularly the defendant is entitled *ex debito justitiae* to have it set aside without any terms whatsoever being imposed on him.

If however the judgment is regular the Court by O. 13 r. 8 of the Rules of the High Court has a discretion to set aside such a judgment. In applying to set aside a regular judgment it is an almost inflexible rule that an affidavit of merits , i.e., showing a defence on the merits, must be filed in support of the applicant *Farden v. Richter* [1889] 23 QBD 124. I might add that the prevalent practice of disclosing a "proposed statement of defence" without such an affidavit does not necessarily meet that requirement. On exercising its discretion the Court

will certainly take into consideration the explanation or the lack of an explanation as to why judgment in default was allowed to be entered *Evan v. Bartlam* [1937] AC 473. Further, the Court will expect the application to set aside to be filed promptly (even if the application to set aside is for irregularity, by o. 2 r. 2 the application should be made within a reasonable time) and if not the explanation if any for the delay would be relevant. Another rule which I would consider to be inflexible is that the defendant seeking the indulgence of the Court under this rule (and for that matter any person seeking the indulgence of the Court under any rule or circumstance) should make full, frank, candid and honest disclosures of all the relevant facts. Failure to do so could result in the Court refusing to exercise its discretion in favour of the applicant.

Since diametrically opposite positions were taken in the affidavit filed on the issue of the writ, I had had the application adjourned to open Court so that oral testimony on the issue could be given.

In his affidavit of service Encik Chan Kai Meng had stated that he had personally served the 2nd defendant at his house in Petaling Jaya on 13 June 1984. He also stated that a couple of days later when the 2nd defendant called on him at his office at Wisma Batu and had disclosed that he was a director of the first defendant, he had served him the writ by way of service on the first defendant corporation.

Both by affidavit and by oral testimony Chan Fan Ann denied the service. He insisted that he had never seen Encik Chan Kai Meng until he met him in Court at the hearing of the instant application. He insisted that he had not known of the fact that there were the proceedings until he had been served with the bankruptcy notice in July 1985.

Evidence was however adduced on behalf of the plaintiffs that on 18 October 1984 a copy of the default judgment was sent to the second defendant to his residential address by ordinary post. Encik Chan Kai Meng testified that such a letter was sent and his clerk Param Jothy a/1 S. Sivanatham confirmed this by his testimony that he had made a record in the despatch book of the fact that such a letter was to be despatched by posting and that he had in fact posted the letter. The relevant despatch book and a copy of the letter were produced.

The probabilities were that the letter was posted and must have in the normal course of events been delivered at the second defendant's residence. It was suggested that there was a possibility that that particular letter may have dropped out of the satchel of the clerk or by other mischance may not have been in fact posted. In the face of the fact that the particulars of that letter had been duly entered in the normal course of events in the usual despatch book kept for that purpose, while it has to be accepted that almost anything is possible, in my judgment, in all the circumstances it is highly improbable that that letter was not posted. And if it was posted it is highly improbable that the postman did not deliver it. It follows that it is highly improbable that the second defendant did not receive that letter and the copy of the judgment it contained, sometime soon after 18 October 1984 (which was the date on which the particulars of the letter was said to have been entered in the despatch book). According to Param Jothy, the letter was posted by him on 19 October. It follows that the probabilities are that the second defendant was lying when he testified that it was only after he was served with the bankruptcy notice that he first was served with any document that disclosed that proceedings had been initiated against him by the plaintiffs and that judgment had been entered against him.

Further the effect of Encik Chan Kai Meng's testimony adduced in open Court was that separate letters of demand had been sent by what is known as A.R. Registered post to both the defendants by the plaintiffs' solicitors addressed to the second defendant's residence. A copy of the letter dated 20 February 1984 to each defendant and what was held out to be the relevant A.R. Registered cards were produced by Encik Chan Kai Meng who is an advocate and solicitor and is the partner of the firm of solicitors acting for the plaintiffs who I gathered had the conduct of the matter for the plaintiffs. Encik Raymond Kwok of Counsel for the second defendant in his submission questioned the admissibility of that letter and the A.R. Registered cards. I am of the view that the objection cannot be upheld. The solicitor having the conduct of the matter is entitled to produce the office copy of the letter sent. The typist who typed the letter need not be called. The A.R. Registered card contained printed material and various entries including a "chop" of the name of the plaintiffs' solicitors the address of the addressee written by what appeared to be a ball pen, what appeared to be post office date stamps (three of them) and other indorsements in ball pen which appeared to have been made by one or more clerks at the relevant post offices. There was also a signature in ink in the column reserved for signature of recipient which appeared to be "PING" on each of the cards. Again I did not see the need to have called each of the persons who made endorsements in the cards whether it be by chop, date stamp, ball pen or ink before it became admissible. I think that the solicitor having the conduct of the matter, in the circumstances of the issue to be tried before me, could properly produce those A.R. Registered cards.

Encik Chan Kai Meng also produced his firm's copy of another letter dated 17 May 1984 said to have been sent to the second defendant and the relevant A.R. Registered card. Again I think that in all the circumstances both those documents could be and were properly produced by Encik Chan Meng as the solicitor who had conduct of the relevant file from which the letter and the A.R. Registered card were produced.

Now, the effect of the fact that the signatures on the A.R. Registered cards could be deciphered to read as names of children of the second defendant resident with him is devastating to say the least. However even without the aid of the evidence that those letters and A.R. Registered cards were sent and probably received, it was not difficult for me to conclude as I have done that Encik Chan Kai Meng had effected personal service of the writ on Encik Chan Fan Ann. That he went to what was admitted to be the second defendant's house, that he found a Volvo motor car parked in the house, the possibility of which happening was admitted by the second defendant, that he could state he was told by the second defendant that that car although parked in his house was not his tested against the second defendant's testimony that the Volvo that used to be parked in his house from time to time was not his, all lead to the conclusion that Encik Chan Kai Meng had indeed attended at the house of the second defendant and had met him and it follows that he must have served a copy of the writ on him.

There was the unchallenged testimony of Param Jothy that a number of attempts had made to serve the writ. It seems to me in the circumstances quite unnecessary for any one, least of all a solicitor, to affirm a false affidavit of service when without much trouble an order for substituted service could have been obtained.

Finally, having seen the two Chans giving testimony in open Court and being cross-examined I was led to conclude from the demeanour of the two witnesses that Encik Chan Kai Meng was a witness of truth while Encik Chan Fan Ann would not hesitate if he thought it would serve his cause to deviate from the truth. That Encik Chan Fan Ann was prepared to state

on oath that his two children whose names appeared to be the names set out as recipients of the said A.R. Registered cards were stupid and irresponsible, I think, demonstrates the extent that he was prepared to go.

On balance of probability I am more than satisfied that the writ was duly served by Chan Kai Meng on Chan Fan Ann as stated in the affidavit of service. The judgment was accordingly a regular judgment. Although there is an affidavit of merits Chan Fan Ann has fallen far short of the test of being frank, candid and honest. He has come to the Court with explanations for allowing the default judgment to be entered as well as for the delay in filing his application both of which explanations are, as has been seen, unacceptable to the Court. He is before the Court with unclean hands and is not entitled to and will not obtain the assistance of the Court. The application to set aside the judgment has to be and is dismissed with costs.

Also found at [1986] 1 CLJ 417